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IN THE

Supreme Court of the United States

October Term, 1958

No. 252

SAFEWAY STORES, INCORPORATED,

Appellant,

v.

OKLAHOMA RETAIL GROCERS ASSOCIATION, INC., and LOUIE J. SPEED, INC.,

Appellees.

On Appeal from the Supreme Court of the State of Oklahoma

MOTION AND BRIEF OF AMICUS CURIAE

CHESTER INWALD
Attorney for Amicus Curiae,
National Association of Tobacco Distributors, Inc.

Of Counsel:
HARTMAN & CRAVEN
39 Broadway
New York 6, N. Y.

Counsel of Record:
CHESTER INWALD
39 Broadway

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United States v. Safeway Stores, Inc. (D. C. Texas, 1957) 20 F. R. D. 451 ... 5

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Arkansas Acts of 1951—Act 101 10
Arkansas Acts of 1949—Act 282 10

California Business & Professional Code, Division 7, Part 2, Chapter 4 9
California General Statutes 1935, Chapter 477 9
Colorado Revised Statutes 1953, Volume 3, Chapter 55, Article 2 9
Colorado Revised Statutes 1953, Chapter 55, Article 3, Section 55-3-1 10
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Hawaii Revised Laws 1955, Title 24, Chapter 205 9

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Kansas General Statutes, 1957 Supplement, Section 50-503 10
Kentucky Revised Statutes 1956, Sections 365.020-365.070 9
Kentucky Revised Statutes 1956, Section 365.280 10

Louisiana Revised Statutes 1950, Title 51, Part VIII, Sub-part E 9
Louisiana Revised Statutes 1950, Title 40, Chapter 4, Sub-part D 10
Louisiana Revised Statutes 1950, Title 51, Section 522 10

Maine Revised Statutes, Ninth Revision, Chapter 184 9
Maryland Code 1951, Article 83, Sections 111-115 9
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Massachusetts General Laws 1932, Chapter 93, Sections 14E-14K 9
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Massachusetts Acts of 1950, Chapter 515 10
Michigan Compiled Laws 1948, Section 445.174 10
Minnesota Statutes 1953, Chapter 325 9
Mississippi Laws 1956, Chapter 134 10
Mississippi Laws of 1954, Chapter 380 10
Montana Revised Code 1947, Title 51, Chapter 1 9

Nebraska Revised Statutes 1943, Chapter 59, Article 12 9
New Hampshire Revised Statutes 1955, Chapter 358 9
New Jersey Revised Statutes, Title 56, Chapter 4 9
New Jersey Laws of 1952, Chapter 247 10
New Mexico Revised Statutes 1953, Section 46-9-11(B) 10
North Dakota Revised Code 1943, Chapter 51-10 9

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Ohio Revised Code, Sections 1333.11, as amended, Laws of 1957, House Bill 800 10
Oklahoma Statutes 1951, Title 15, Chapter 14, Sections 598.1-11 (Oklahoma Unfair Sales Act) 6, 7, 8, 9, 16, 18, 19, 25, 26, 31
Oklahoma Statutes 1951, Title 15, Chapter 14, Sections 599.1, as amended, Laws of 1957, Senate Bill 449 10
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Oregon Revised Statutes, Title 50, Chapter 646, Sections 646.100-180 9

Pennsylvania Laws of 1941, Act No. 344 9
Pennsylvania Laws of 1949, Act 478 10

Rhode Island Acts and Resolves of 1941, Chapter 1039 10
Rhode Island Public Laws 1939, Chapter 671 9

South Carolina Code of Laws 1952, Title 56, Chapter 2, Article 3 9

Tennessee Code 1955, Title 69, Chapter 4, Section 69-403 10
Tennessee Code 1955, Title 69, Chapter 3 9

Utah Code 1953, Title 5, Chapter 4, Section 5-4-6 10
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Wyoming Compiled Statutes 1945, Article 4, Sections 39-406 to 39-416 9

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Brandeis, Cut-Throat Prices, The Competition That Kills, Harper's Weekly, November 15, 1913 12

Brown & Davidson, Retailing Principles and Practices (1953) 25

86 University of Pennsylvania Law Review 780 (1938) 28

Englund, Operating Results of Food Chains in 1957 (1958) 25

Federal Trade Commission, Chain Stores—Chain Store Price Policies, Senate Document No. 85 (1933) 73rd Congress, 2nd Session 14

Gummed Paper & Sealing Tape Industry Trade Practice Conference Rules, 16 C. F. R. 19 30

Kaufman & Hartman, History of State Unfair Sales Acts (1950) 13

Mason, Brandeis: A Free Man's Life (1946) 12

Paper Bag Industry Trade Practice Conference Rules, 16 C. F. R. 24 30

Zorn & Feldman, Business Under The New Price Laws (1937) 11, 27

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Appellees.

On Appeal from the Supreme Court of the State of Oklahoma

Motion for Leave to Submit a Brief Amicus Curiae.

To the Honorable, the Chief Justice and the Associate Justices of the Supreme Court of the United States:

The undersigned, as counsel for The National Association of Tobacco Distributors, Inc., a membership corporation organized under and by virtue of the laws of the State of New Jersey as a business league, and in behalf of the said National Association of Tobacco Distributors, Inc., respectfully moves this Court for leave to file the accompanying brief as *amicus curiae.*

The organization that proposes to submit this brief is the only national association of wholesale tobacco mer-

chants in the United States and, as such, represents a trade engaged in the distribution of tobacco, candy, and other soft goods consumer commodities having an estimated retail value in excess of Six Billion Dollars ($6,000,000,000) to more than one million three hundred thousand (1,300,000) retail outlets throughout the United States. The said Association and its members, have a direct and acute interest in this proceeding which raises before this Court for the first time the question whether a state law prohibiting sales below cost as an unethical method of business competition is violative of the Federal constitution.

The members of this Association are engaged in a marginal business having minimal markups over invoice costs. They would be drastically affected by this Court's invalidation of sales below cost laws. The Association was only recently advised of the pendency of the instant case at its annual meeting in Chicago held in April of this year and counsel for the Association was requested on April 10, 1959 by the Association's Board of Directors to seek leave and to file a brief *amicus curiae* in support of the appellees herein. It is, at this writing, only two weeks since counsel for the Association first had an opportunity to read the briefs of the parties hereto and it is for that reason that the Association seeks leave at this late date to file its brief *amicus curiae*.

The National Association of Tobacco Distributors, Inc. has devoted considerable time and effort to studies of state laws prohibiting or limiting sales below cost. It has consequently amassed a substantial fund of economic and legal material bearing upon this problem. Inasmuch as this proceeding brings before this Court a question of novel impression with respect to such state legislation, the

said Association desires to make available to this Court the fruits of its study on the questions at issue and to speak for it members and their one millon three hundred thousand (1,300,000) customers in support of unfair sales legislation which, the Association believes, not only conduces to general business morality but also is essential for its members' continued economic viability.

Although the record below would indicate that the original appeal is solely from the rather narrow question of the constitutionality of the Oklahoma Unfair Sales Act as applied and construed under the circumstances of record in this case, an examination of the appellant's brief shows that the appellant seeks to call in question not only the constitutionality of the Oklahoma law in particular but also the constitutionality of all such laws in general. A ruling by this Court adverse to the appellees would therefore not only have a direct effect upon these appellees but, most likely, would have an equally direct and adverse effect upon each and every member of this Association engaged in business in any one of the thirty-eight (38) jurisdictions presently enjoying the benefits of unfair sales laws regulating the sale of the commodities in which they deal.

The said Association is deeply disturbed and directly affected by the present assault upon sales below cost laws. It believes that it has and can supply additional information to this Court beyond that already canvassed in the briefs submitted by the appellant and the appellees. The accompanying brief contains a study of the economic factors that impel state legislatures to enact unfair sales laws both of general and particlular application. It also contains a citation and discussion of the treatment accorded by the courts to analogous state legislation when subjected to constitu-

tional attack as well as a discussion of the relationship between federal and state loss limitation legislation.

None of the foregoing material is treated in any detail in the briefs of the parties to this proceeding. It is believed that all of it is material to a determination of the issues here raised.

It is respectfully urged that the accompanying brief *amicus curiae* be accepted by this Court. Consent of counsel for all parties to the filing of this brief has been sought. Counsel for the appellees has consented but counsel for the appellant have refused such consent.

Dated: May 6, 1959.

Respectfully submitted,

CHESTER INWALD
Counsel of Record for Amicus Curiae
39 Broadway
Borough of Manhattan (6)
City of New York

BRIEF OF AMICUS CURIAE

The National Association of Tobacco Distributors, Inc. respectfully submits this brief as *amicus curiae* in support of the appellee. The interest of the Association in the issues raised by this case is set forth in the motion for leave to file the brief for *amicus curiae* annexed hereto.

Statement of the Case

The proceedings in this case are fully detailed in the appellee's brief on the merits (pp. 1-11) and will only be briefly summarized here.

The action below was originally brought for the purpose of enjoining the appellant from selling certain selected items of merchandise below cost. The appellant is a nationwide chain of grocery stores, having an avowed purpose of capturing a stated percentage of the total grocery business done within each territorial area in which it operates. One of the techniques which the appellant apparently commonly employs to capture a significant area of each market in which it is engaged is to sell merchandise below cost for the purposes of diverting trade away from its competitors (*See U. S.* v. *Safeway Stores, Inc.* (D. C. Texas, 1957) 20 F. R. D. 451 at 453; *and see* final judgment, Hon. Joe E. Estes, District Judge, United States District Court, Northern District, Texas, Civil Docket No. 3173, filed December 7, 1957, decretal par. No. IV, C. C. H. 1957 Trade Cases, par. 68,871 at p. 73,531, not otherwise reported).

In the instant case it would appear that the appellant, Safeway Stores, Inc. set for itself a goal of 20% of all the grocery business done in Oklahoma city. Employing the tactics previously condemned by the federal courts in Texas as a violation of Section 3 of the Robinson-Patman Act,

appellant proceeded to reduce its prices on certain selected popular items which had a ready consumer acceptance at well known and established prices. Concededly, it did not offer all of its merchandise at or below cost. To use the very language of appellant's brief "Instead, it selected the ones it thought the customers were familiar with the price of (R. 258)." (Appellant's brief, pp. 9-10.)

As a result of these price cuts, other grocery chains felt impelled to meet Safeway's below cost prices and apparently the prospect of a generalized price war at numerous places throughout the state became imminent. To avert this danger, the Oklahoma Retail Grocers Association sought and obtained in the Oklahoma County District Court an injunction prohibiting Safeway from selling merchandise at less than its cost and in violation of the provisions of the Oklahoma Unfair Sales Act. From this decision, Safeway appealed to the Oklahoma Supreme Court which affirmed the injunction (*Safeway Stores, Inc.* v. *Oklahoma Retail Grocers Association* (1957) 322 P. 2d 179).

From the facts before this Court, this case presents the classical example of the reason for the enactment by the various states of loss limitation statutes, commonly called unfair sales laws. The avowed purposes of such legislation is to designate the practice of selling below cost as an unfair method of competition tending to monopolize trade, destroy small competitors and deceive customers into believing that all merchandise sold by the price-cutter is similarly low-priced. It is this avowed purpose of the Oklahoma Unfair Sales Law which the appellant here calls into question as violative of the federal constitution on the grounds that, under some hypothetical but not as yet established factual situations, the law might work an inequity against an as yet undiscovered merchant who desires to sell certain items below cost with an allegedly innocent intent.

SUMMARY OF ARGUMENT

Point I

The Oklahoma Unfair Sales Act (15 Okla. Stat. Chapt. 14, Secs. 598.1-.11) is an expression of the state's economic policy reasonably related to the promotion of the public welfare and does not prevent the appellant from competing on fair and equitable terms with all other merchants of groceries within the state.

Since the law, as enacted, is reasonably related to the ends desired to be achieved, this Court will not substitute its judgment as to the economic validity of a policy for that of the legislature.

The exemption in the statute permitting the appellant and any other retailer to sell below its cost in order to meet the lower cost price of a competitor does not operate to invalidate the statute and make it repugnant to the constitution

The legislature of the State of Oklahoma has the plenary power to absolutely prohibit commercial practices which it finds to be generally injurious to the public welfare of the state. Thus, even if the appellant was prohibited from meeting the lower price of a competitor, it would have no cause to complain of the unconstitutionality of the statute in question so long as the practice proscribed has a reasonable relationship to the ends to be achieved where the ends are within the competence of the state's police power. In point of fact, however, the appellant's conduct is not so circumscribed by the decision below. It is only prevented from appearing to meet its competitor's prices while in actuality it is not so doing.

Point II

The Oklahoma Unfair Sales Act does not violate the federal supremacy clause in Article VI, Clause 2 of the Constitution of the United States. Regulation by Congress of interstate commerce does not pre-empt state regulation of commercial activities. The Oklahoma Unfair Sales Act is consonant to and in conformity with federal regulation of similar conduct in the course of interstate transactions.

ARGUMENT

POINT I

The Oklahoma Unfair Sales Act does not violate the due process or equal protection clauses of the Fourteenth Amendment to the United States Constitution and the appellant, Safeway Stores, has wholly failed to disclose any infringement of its constitutional rights.

At this date it cannot be questioned that the police power of the state to legislate for the public welfare of its inhabitants is an essential element of title to private property, and it is no objection to its reasonable exercise that private property is impaired in value or otherwise adversely affected. (*Ziffrin Inc.* v. *Reeves* (1939) 308 U. S. 132, 139; *City of Clayton* v. *Nemours* (1944) 353 Mo. 61, 182 S. W. 2d 57 *app. dism.* 323 U. S. 684; *East New York Savings Bank* v. *Hahn* (1945) 326 U. S. 230.) The sole object of inquiry before this Court is whether this particular exercise of the police power by Oklahoma, in prohibiting sales below cost with the intent of injuring competition, is a reasonable one or whether it is so unreason-

able, arbitrary and discriminatory as to deprive the appellant of due process and the equal protection of the law.

Laws prohibiting sales below cost in their present form have been in existence now for a quarter of a century since the enactment in 1935 of the first such law by the State of California (Cal. Gen. Stat., 1935, Chap. 477). Since that time some thirty-one states[1] have enacted laws of general application proscribing sales below cost while twenty-seven states have in addition or instead, enacted such laws applicable only to one or more products particularly sensitive

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[1] *Arizona* (Rev. Stat., 1955, Vol. 5, Tit. 44, Chap. 10, Art. 4); *Arkansas* (Ark. Stat. Ann., 1947, Vol. 6, Tit. 70, Part 2, Chap. 3); *California* (Business & Professional Code Div. 7, Pt. 2, Chap. 4); *Colorado* (Colo. Rev. Stat., 1953, Vol. 3, Chap. 55, Art. 2); *Connecticut* (Conn. Gen. Stat. Rev., 1949, Tit. 48, Chap. 314); *Hawaii* (Hawaii Rev. Laws, 1955, Tit. 24, Chap. 205); *Idaho* (Idaho Code, 1947, Tit. 48, Chap. 4 as amended); *Kansas* (Kan. Gen. Stat., 1949, Chap. 50, Art. 4); *Kentucky* (Ky. Rev. Stat., 1956, Secs. 365.020-365.070); *Louisiana* (La. Rev. Stat., 1950, Tit. 51, Part VIII, Sub-part E); *Maine* (Me. Rev. Stat., Ninth Rev., Chap. 184); *Maryland* (Md. Code, 1951, Art. 83, Secs. 111-115); *Massachusetts* (Mass. Gen. Laws, 1932, Chap. 93, Secs. 14E-14K); *Minnesota* (Minn. Stat., 1953, Chap. 325); *Montana* (Mont. Rev. Code, 1947, Tit. 51, Chap. 1); *Nebraska* (Neb. Rev. Stat., 1943, Chap. 59, Art. 12); *New Hampshire* (N. H. Rev. Stat., 1955, Chap. 358); *New Jersey* (N. J. Rev. Stat., Tit. 56, Chap. 4); *North Dakota* (N. D. Rev. Code, 1943, Chap. 51-10); *Oklahoma* (Okla. Stat., 1951, Tit. 15, Chap. 14, Secs. 598.1-11); *Oregon* (Ore. Rev. Stat., Tit. 50, Chap. 646, Secs. 646.100-180); *Pennsylvania* (Pa. Laws of 1941, Act No. 344); *Rhode Island* (R. I. Pub. Laws, 1939, Chap. 671); *South Carolina* (So. Car. Code of Laws, 1952, Tit. 56, Chap. 2, Art. 3); *Tennessee* (Tenn. Code, 1955, Tit. 69, Chap. 3); *Utah* (Utah Code, 1953, Tit. 13, Chap. 5); *Virginia* (Va. Code, 1950, Tit. 59, Chap. 2); *Washington* (Wash. Rev. Code, 1951, Tit. 19, Chap. 19.88); *West Virginia* (W. Va. Code, Secs. 4678 (8) (a)-(n)); *Wisconsin* (Wisc. Stat., 1955, Tit. XII, Chap. 100, Sec. 100.30); and *Wyoming* (Wyo. Comp. Stat., 1945, Art. 4, Secs. 39-406 to 39-416).

to price manipulation.[2] These laws demonstrate a widespread response to the felt necessity of curbing a sales practice deemed by many to be a form of commercial fraud and deception deleterious to a healthy competitive economy —the "loss leader."

The rise during the past fifty years of mass retail distributive entities employing new sales techniques left the older and smaller retail distributors at a competitive disadvantage. Many of the new sales techniques resulted from allegedly more efficient economic concentrations of capital and an allegedly more rational geographic distribution of facilities. However, the loss leader is not attributable to the more efficient operative ability of the large retailer. It is the calculated use of the leverage afforded

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[2] *E.g.* states enacting laws applicable to milk and dairy products: *Arkansas* (Ark. Acts of 1955, Act 380); *Idaho* (Idaho Code, 1947, Sec. 37-1003B); *Kansas* (Kan. Gen. Stat., 1957 Supp., Sec. 50-503); *Louisiana* (La. Rev. Stat., 1950, Tit. 40, Chap. 4, Sub-part D); *Mississippi* (Miss. Laws, 1956, Chap. 134); and *Oklahoma* (Okla. Laws of 1955, S. B. 305). States enacting laws applicable to cigarettes: *Alabama* (Acts of 1951, Act No. 805); *Arkansas* (Acts of 1951, Act 101); *Colorado* (Rev. Stat., 1953, Chap. 55, Art. 3, Sec. 55-3-1 *et seq.*); *Connecticut* (Gen. Stat. Rev., 1949, Tit. 15, Chap. 98, Sec. 2004); *Indiana* (Acts of 1949, Chap. 51); *Iowa* (1954 Code, Chap. 551a); *Kentucky* (Rev. Stat., 1956, Sec. 365.280); *Maryland* (Acts of 1956, Chap. 90); *Massachusetts* (Acts Resolves of 1941, Chap. 715); *Mississippi* (Laws of 1954, Chap. 380); *New Jersey* (Laws of 1952, Chap. 247); *Ohio* (Rev. Code, Secs. 1333.11 *et seq.* as amended, Laws of 1957 H. B. 800); *Oklahoma* (Stat., 1951, Tit. 15, Chap. 14, Secs. 599.1 *et seq.* as amended, Laws of 1957 S. B. 449); *Pennsylvania* (Laws of 1949, Act 478); *Rhode Island* (Acts and Resolves of 1941, Chap. 1039); *Tennessee* (Ann. Code, 1955, Tit. 69, Chap. 4, Sec. 69-403) and *Washington* (Laws of 1957, Chap. 286). States enacting laws applicable to miscellaneous products: *Arkansas* (Ark. Acts of 1949, Act 282, *liquor*); *Louisiana* (La. Rev. Stat., 1950, Tit. 51, Sec. 522, *drugs and cosmetics*); *Massachusetts* (Mass. Acts of 1950, Chap. 515, *motor fuel*); *Michigan* (Mich. Comp. Laws, 1948, Sec. 445.174, *bakery and petroleum products*); *New Mexico* (N. M. Rev. Stat., 1953, Sec. 46-9-11(B), *beer, wines and liquor*); and *Utah* (Utah Code, 1953, Tit. 5, Chap. 4, Sec. 5-4-6, *agricultural products*).

by size and mass to sell at sacrificial prices for the purpose of destroying competition or absorbing a predetermined percentage of the market volume. Accompanying these sales at prices often below the actual cost of acquisition of the product, is the, frequently false, advertising overtone that all other merchandise is sold by the loss leader practitioner at equally low prices.

A loss leader "* * * involves the offer for sale of specific commodities at a very low markup—sometimes even at or below actual invoice cost. Concessions of this character are usually confined to widely advertised, branded articles on which the public is able to make price comparisons. * * * In every case, however, at least one objective is to attract the consumer to the store and to place before his eyes the other commodities offered for sale, on which the normal profit margin is asked, at the same time establishing the impression that the store maintains a generally low price policy. * * *

"Mass distributors are able to use leader tactics more effectively than most independents, for several reasons. Their superior financial resources permit them to advertise the leader offer more widely. Their wider diversification is an important asset; losses sustained on any one item can readily be charged to total cost as an advertising expense. Furthermore, they are often able to push the sale of private brands, on which the difficulty of price comparisons makes possible a comfortable profit, as an incident of a sales campaign headed by a widely advertised leader. Finally, the geographic dispersion of chains makes possible price discrimination between stores in different localities. Prices can be lowered in any area in which competition is intense, and raised simultaneously where the pressure is less keen. Tactics of this character cannot be duplicated effectively by independents". (Zorn & Feldman, *Business*

Under the New Price Laws (Prentice-Hall, 1937) pp. 9 and 10, see also *id.* at 265 to 274, 317 to 326.)

In an article originally published as long ago as the November 15, 1913 issue of Harper's Weekly, Mr. Brandeis condemned the loss leader practice, saying:

> "* * * But the cut-price article would more appropriately be termed a 'mis-leader'; because ordinarily the very purpose of the cut-price is to create a false impression.
>
> "The dealer who sells the Dollar Ingersoll watch for sixty-seven cents, necessarily loses money in that particular transaction. He has no desire to sell any article on which he must lose money. He advertises the sale partly to attract customers to his store; but mainly to create in the minds of those customers the false impression that other articles in which he deals and which are not of a standard or known value will be sold upon like favorable terms. The customer is expected to believe that if an Ingersoll watch is sold at thirty-three and one-third percent less than others charge for it, a ready-to-wear suit or a gold ring will be sold as cheap. The more successful the individual producer of a trade-marked article has been in creating for it a recognized value as well as a wide sale, the greater is the temptation to the unscrupulous to cut the price. Indeed a cut-price article can ordinarily be effective as a 'mis-leader' only when both the merits and the esablished selling price are widely known." *Harper's Weekly,* Nov. 15, 1913 at p. 10; *see also* Alpheus T. Mason, *Brandeis: A Free Man's Life* (Viking, 1946) 424-8.

The economic experience abroad with respect to sales below cost betrays a similar reaction to this practice. In 1931, by order of the Government of Great Britain, the Lord Chancellor and the President of the Board of Trade of that country appointed a committee of prominent economists to investigate certain monopolistic practices in the

United Kingdom. Concerning the problem of loss leaders, this committee found:

> "We have been impressed by the volume and force of the testimony as to the harmful effects of price-cutting upon the manufacturers and distributors of advertised branded goods and ultimately, as was contended, upon the public. The selling of branded goods at abnormally low prices in order to attract customers to buy other goods tends to disorganize and antagonize the retail trade. Shopkeepers in the neighborhood of price-cutters cease to stock the goods affected or at any rate cease to push them with the result that the manufacturer finds his sales falling off. In the end the price-cutters themselves may cease to stock the goods finding that they are no longer effective as a decoy." (Cited, Kaufman & Hartman, *History of State Unfair Sales Acts* (N.A.T.D. Inc., 1950) page 6.)

Sales below cost have often been treated by state courts and federal courts of inferior jurisdiction as valid subjects for legislative restraint. The evils they conduce have often been commented upon. It has been stated that cutthroat price competition is a weapon by which the large firm drives its smaller rivals out of business after which the price-cutter may have a monopoly in the affected territory. (*State* v. *Langley* (1938) 53 Wyo. 332; 84 P. 2d 767). It has been pointed out that if a chain store sets its prices below cost in one area, there is an almost irresistible conclusion that its prices in another area will be raised to compensate for the losses (*U. S.* v. *N. Y. Great A & P Tea Co.* (CCA 7, 1949) 173 F. 2d 79 at p. 87 *cf. Moore* v. *Mead's Fine Bread* (1954) 348 U. S. 115, 119). It also seems fairly well established that a loss leader practitioner who sells one item below cost often raises his prices on many other articles in the same store to compensate for his excessively low price on the leader (See Federal Trade Commission

Report entitled *Chain Stores—Chain Store Price Policies*, S. Doc. No. 85 (1933) 73rd Cong. 2d Sess. at pp. 29, 104). In any case there is little doubt that the reason why a large retail chain offers merchandise at less than cost is for the purpose of deceiving its customers into believing that the seller is offering all his goods at low prices when in fact the majority of his prices are at least as high as those prevailing generally in the trading area and sometimes even higher (*Wholesale Tobacco Dealers Bureau* v. *National Candy & Tobacco Co.* (1938) 11 Cal. 2d 634, 82 P. 2d 3, 13).

Given the situation thus described, a situation which a substantial majority of the states, representing all geographic regions of the nation and a cross section of the national economic interests, have found, since the turn of the century, to be an evil, there can be no doubt, under the prevailing rules of constitutional interpretation, that it was well within the competence of the state to seek corrective measures for its remedy (*Olsen* v. *Nebraska* (1940) 313 U. S. 236, 244-245). There remains but to consider whether the means adopted by the State of Oklahoma to achieve the end desired are so peculiar and arbitrary as to deprive this appellant of rights guaranteed by the Due Process and Equal Protection clauses of the United States Constitution.

The principal plaint that the appellant brings before this court is that in certain hypothetical circumstances, it would be deprived of the privilege of meeting its competitor's prices by selling below cost.

At the outset it must be noted that, inasmuch as the evidence of record does not disclose the existence in this case of those hypothetical circumstances, such extreme examples are not now before this court. In *Day-Brite Lighting Inc.* v. *Missouri* (1952), 342 U. S. 421 at 424 this court stated "Extreme cases are conjured up where an

employer is required to pay wages for a period that has no relation to the legitimate end. Those cases can await decision as and when they arise." To the same effect, see also *F.T.C.* v. *National Lead Co.* (1957), 352 U. S. 419 at 431 and *International Salt Co.* v. *U. S.*, (1947) 332 U. S. 392 at 401.

Assuming, however, without conceding the same, that one of the hypotheticals set forth in the appellant's brief at pages 20 through 22 thereof, were before this court, such situation would not mar the constitutional validity of this unfair sales statute.

Where a state has found certain types of conduct to be generally harmful to the best interest of its citizens, the state may validly proscribe all such conduct even though under certain unusual circumstances the prohibited conduct is innocent and does not give rise to the evil to be remedied.

In *Central Lumber Co.* v. *South Dakota* (1912), 226 U. S. 157, the State of South Dakota prohibited under criminal sanction the sale of a commodity by a dealer at a lower rate in one section of the state than such person charged for such commodity in another section. Mr. Justice Holmes, speaking for this court, upheld the constitutional validity of the statute stating (at 160) "If the legislature shares the now prevailing belief as to what is public policy and finds that a particular instrument of trade war is being used against that policy in certain cases, it may direct its law against what it deems the evil as it actually exists without covering the whole field of possible abuses, and it may do so none the less that the forbidden act does not differ in kind from those that are allowed. *Lindsley* v. *Natural Carbonic Gas Co.*, 220 U. S. 61, 81. *Missouri Pacific Ry. Co.* v. *Mackey*, 127 U. S. 205."

In *Railway Express* v. *New York* (1948), 336 U. S. 106, 110, this court stated "* * * the classification has relation to the purpose for which it is made and does not contain the kind of discrimination against which the Equal Protection Clause affords protection. It is by such practical considerations based on experience rather than by theoretical inconsistencies that the question of equal protection is to be answered. *Patsone* v. *Pennsylvania*, 232 U. S. 138, 144; *Marcus Brown Co.* v. *Feldman*, 256 U. S. 170, 198-199; *Metropolitan Co.* v. *Brownell*, 294 U. S. 580, 585-586. And the fact that New York City sees fit to eliminate from traffic this kind of distraction but does not touch what may be even greater ones in a different category * * * is immaterial. It is no requirement of equal protection that all evils of the same genus be eradicated or none at all." See also *Hughes* v. *Superior Court* (1949), 339 U. S. 460 and cases collected at 468.

In point of fact, however, the alleged inconsistencies in the law listed in the appellant's brief at pages 20 through 22 thereof are not inconsistencies at all and do not prevent the appellant from competing or injure it in its competition. The first hypothetical, for example, found at the bottom of page 20 of the appellant's brief posits a situation where a grocer sells certain items at one cent above invoice cost which is less than statutory cost because "he believes he makes more money on these items at this markup than he does" on other items with a higher markup. In this hypothetical, if the dealer is making money, then obviously he is not selling below cost. He may be selling below the presumptive markup as established in Section 598.2(a) of the Oklahoma Unfair Sales Act but he is not selling "below cost" since this presumptive markup is only applicable, by the very terms of that section, "in the absence of proof of a lesser cost". A merchant who "believes" he is making

money on a one cent markup should be able to show that his costs of doing business for this particular item is less than one cent. Such merchant is not selling below cost and the appellant may safely meet his prices even if they involve a sale by appellant below cost to it.

The second hypothesis is a completely erroneous view of the instant case. In the hypothesis (appellant's brief, p. 21) it is claimed that a seller may not reduce his prices below cost on all his merchandise for the purposes of meeting the competition of a competitor who employs trading stamps. The appellant, of course, did not engage in an across the board price reduction. It reduced prices only on the items "it thought the customers were familiar with the price of" (appellant's brief, pp. 9 and 10). This is precisely the evil which unfair sales laws are designed to correct—the evil of reducing prices on certain selected items for the purposes of deceiving consumers into believing that an across the board price reduction has been given. There is nothing in the case below that would prevent the appellant from meeting trading stamp competition by giving a uniform cash discount, in good faith, on all the commodities it offered for sale. What the Oklahoma law does prohibit is the appellant's avowed practice of appearing to grant such a discount by making selective reductions in price, while, in actuality, not giving a cash discount on the vast majority of its merchandise.

Hypothesis 3 as found at page 21 of the appellant's brief posits the existence of a high hearted open-handed grocer who desires to distribute his Easter hams at cost in the Easter season. His objective is not to steal a march on his competitors but to create good will among his customers. The example given at page 22 of the appellant's brief is basically the same, only here the hypothetical

grocer gives away bread below cost rather than hams. The appellant claims that it could not meet the prices of these fictitious competitors since their below cost prices were established without an intent to destroy competition and solely for the purposes of fostering good will. However, the same law which permits these fictional competitors to sell at below cost prices for unsullied motives equally and impartially permits the appellant to do the same. The appellant also may distribute bread to the poor and hams to the celebrants at below cost prices if its motive is pure and there is absent an intent to affect competition adversely.

The final example to be considered (appellant's brief, p. 21) quite clearly falls into the *de minimis* category. In this last hypothetical, a grocer acquires Grade A peaches at a bargain price and sells them above statutory costs. To maintain a customary price differential he reduces the price on Grade B peaches below statutory cost. The appellant deplores the fact that under these non-existent circumstances, it would not be able to meet the price on Grade B peaches. The appellant, however, neglects to mention that the essence of the bargain is the special sales price on Grade A peaches—a price which the statute specifically permits the appellant to meet. Query also whether appellant may not meet the price on Grade B peaches since the purpose of its reduction would likewise be not to sell below cost for the purposes of injuring competition but rather for the purposes of maintaining the customary price differential between the appellant's Grade A and Grade B peaches.

Thus the anticipated horrendous results which the appellant foresees as a consequence of the continued validity of the Oklahoma Unfair Sales Law are shown to be figments of the imagination which not only have not occurred but which, if present, would in no way inhibit the appellant's competitive ability.

It is, in addition, inaccurate to claim as the appellant does (brief, p. 17) that the Oklahoma Unfair Sales Law is unique in drafting its meeting competition exemption in terms of meeting competitors' statutory cost prices. The Iowa Unfair Cigarette Sales Act (Iowa Code, 1954, Chap. 551A, sec. 551A.7, par. 1) contains a similarly worded exemption and has been construed by the Supreme Court of that state (*May's Drug Stores, Inc.* v. *State Tax Commission* (1951), 242 Iowa 319, 45 N. W. 2d 245) as having the same intent and meaning as all other statutes differently worded which grant a seller an exemption in order to meet the lawful price of the seller's competitor. There is no evidence to show that the courts of Oklahoma otherwise construe their statute than do the courts of Iowa. In point of fact the court below did hold that this questioned section of the law was to be construed as to permit this appellant to meet the "legal" price of its competitors and not the "cost" price of its competitors (322 P. 2d 179 at 181).

Thus the issue that the appellant raises in this appeal is doubly hypothetical. Not only is there no evidence to show that any situation has arisen which would give rise to a problem in the construction of the meeting competition section of the Oklahoma Unfair Sales Law, but also there is no evidence that, if such problem should ever arise, the courts of Oklahoma have in the past or would in the future construe the law in a fashion as to prevent a seller from meeting any lawful price of his competitor.

In actuality there is no substantial argument as to the constitutionality of loss leader limitation laws. In the thirty-eight jurisdictions which have enacted such laws, some of these laws applying to all products generally, others applying to one or more products, the courts have been almost uniform in affirming the principles of these

laws against constitutional attack.[3] The only exception discovered is in the case of the State of Georgia which has invalidated its unfair cigarette sales act in *Williams* v. *Hirsch* (1955) 87 S. E. 2d 70, in a terse opinion which apparently relied upon fair trade cases and not upon loss leader laws at all. It would further appear that the court's ruling was based upon the theory that the business of cigarettes was not "affected with a public interest," a standard abandoned by this Court in *Nebbia* v. *New York* (1934) 291 U. S. 502 as so clearly shown in this Court's decision in *Olsen* v. *Nebraska* (1940) 313

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[3] The following states have upheld the validity of sales below cost laws: *Alabama* (*Hilliard* v. *Edwards*, Cir. Ct. Montgomery Cty., in equity, Case No. 26,044, decision and opinion rendered by Honorable Walter B. Jones, April 16, 1954); *Arizona* (*State* v. *Walgreen Drug Co.* (1941) 57 Ariz. 308,113 P. 2d 650 eliminating one provision but affirming constitutionality); *California* (*Wholesale Tobacco Dealers Bureau* v. *National Candy & Tobacco Co.* (1938) 11 Cal. 2d 634, 82 P. 2d 3); *Colorado* (*Dikeou* v. *Food Distribution Association* (1941) 107 Colo. 38,108 P. 2d 529); *Connecticut* (*Carroll* v. *Schwartz* (1940) 127 Conn. 126, 14 Atl. 2d 754); *Iowa* (*May's Drug Stores, Inc.* v. *State Tax Commission* (1951) 242 Iowa 319, 45 N. W. 2d 245); *Kansas* (*State of Kansas* v. *Consumer Warehouse Market Inc.* (Sup. Ct. Kan. 1958) 329 P. 2d 638); *Kentucky* (*Moore* v. *Northern Kentucky Independent Food Dealers* (1941) 286 Ky. 24,149 S. W. 2d 755); *Louisiana* (*Louisiana Wholesale Distributors Association Inc.* v. *Rosenzweig* (La. Sup. Ct., 1948) 36 So. 2d 403); *Massachusetts* (*Fournier* v. *Troiancllo* (1955) 332 Mass. 636, 127 N. E. 2d 167); *Minnesota* (*McElhone* v. *Geror* (1940) 207 Minn. 580, 292 N. W. 414); *Montana* (*Associated Merchants of Montana* v. *Ormesher* (1939) 107 Mont. 530, 86 P. 2d 1031); *Nebraska* (*Hill* v. *Kusy* (1949) 150 Neb. 653, 35 N. W. 2d 594); *New Hampshire* (*McIntire* v. *Borofsky* (1948) 95 N. H. 174, 59 Atl. 2d 471); *New Jersey* (*Lane* v. *Tilton* (1951) 81 Atl. 2d 786 holding statute unconstitutional but affirming constitutionality of such statutes generally); *Oklahoma* (*Adkson* v. *Oklahoma Retail Grocers Association* (1951) 204 Okla. 199, 228 P. 2d 376); *Tennessee* (*Rust* v. *Griggs* (1938) 172 Tenn. 565, 113 S. W. 2d 733); *Washington* (*State* v. *Sears* (1940) 4 Wash. 2d 200, 103 P. 2d 337); *Wisconsin* (*State* v. *Ross* (1951) 259 Wisc. 379, 48 N. W. 2d 460); and *Wyoming* (*State* v. *Langley* (1938) 53 Wyo. 332, 84 P. 2d 767).

U. S. 236 at 245. It should also be noted that, on constitutional questions, the State of Georgia follows the dissent of Mr. Justice Sutherland in the *Nebbia* case rather than what has been the normative interpretation of the police power of the state for the past quarter century. (*See* in this regard, *Harris* v. *Duncan* (1951) 208 Ga. 561, 67 S. E. 2d 692).

Apart from this one aberration, there is no record of judicial denunciation of the principles behind this form of economic legislation. Even those cases which have found particular state's statutes in some measure defective, there has been a merited recognition of the power of the state to enact sales below cost legislation.

Thus the Supreme Court of Ohio in invalidating the unfair cigarette sales law of that state took issue solely with the fact that cash and carry wholesalers suffer discrimination under its terms as opposed to full line wholesalers. Nevertheless, while invalidating the law of that State in *Serrer* v. *Cigarette Service Co.* (1947), 76 N. E. 2d 91, the court stated "In this day and age it can hardly be urged that legislative bodies in the exercise of police power may not, in the public interst and in the promotion of economic stability, prohibit sales below cost * * *."

Similarly, in *Lane* v. *Tilton* (*supra*, footnote 3), the Supreme Court of New Jersey, although invalidating that state's law for failure to treat all who sell at wholesale on equal terms, nevertheless said "Thirty-one states have enacted legislation prohibiting sales of commodities below cost. Whenever the acts have been questioned the courts uniformly have agreed that the Legislature had the constitutional right to accomplish the result intended. In instances certain provisions of the acts have been held to be invalid, but where this has occurred it was not a question of the right of the Legislature to act but a question of the reasonableness of the method employed or the definite-

ness thereof. No state has declared that the exercise of the police power in forbidding loss leader selling is unconstitutional *per se*. *See Wholesale Tobacco Bureau of Southern California, Inc.* v. *National Candy & Tobacco Co.*, 82 P. 2nd 3 (Sup. Ct. of Cal., 1938); *Associated Merchants of Montana* v. *Ormesher*, 86 P. 2nd 1031, 107 Mont. 530 (1939)."

And in *San Antonio Retail Grocers* v. *Lafferty* (1957), 297 S. W. 2d 813, although the Supreme Court of Texas held that state's grocery store unfair sales act unconstitutional, it did so for the reason that the law was applicable only to grocery stores and not to other stores selling similar merchandise which were or might be in competition with grocery stores. The court carefully distinguished unfair sales laws of general application which had been held good in almost all jurisdictions as well as unfair cigarette sales acts which cover all who deal in a particular commodity, citing the *May's Drug Store* case (*supra*, footnote 3), and was at great pains to point out that its decision did not imply a repudiation of the principles established by the Iowa Supreme Court as well as the highest courts of almost every jurisdiction called on to decide this question.

In upholding the unfair sales law of the State of Nebraska, the Supreme Court of that state declared in *Hill* v. *Kusy* (1949), 150 Neb. 653, 35 N. W. 2d 594 "In the exercise of and within the limits of its police power the legislature may forbid that which it deems to be an existing evil and it may limit its prohibition to the matters which in its judgment menace the public welfare." This opinion comports well with the economic latitude which this court is wont to grant state legislation regulating commercial activities.

Thus in *Old Dearborn Distilling Co.* v. *Seagram Distilling Corp.* (1936), 299 U. S. 183, 196, this court stated that "* * * where the question of what the facts establish

is a fairly debatable one, we accept and carry into effect the opinion of the legislature". And in *Lincoln Federal Labor Union* v. *Northwestern Iron & Metal Co.* (1949), 335 U. S. 525, 536 it was said that "* * * states have power to legislate against what are found to be injurious practices in their internal and commercial business affairs so long as their laws do not run afoul of some specific federal constitutional prohibition or of some valid federal law."

In a now famous and much quoted dissent apropos the problem of loss leader selling, Mr. Justice Holmes stated, "I cannot believe that, in the long run, the public will profit by this court permitting knaves to cut reasonable prices for mere ulterior purposes of their own and thus impair, if not destroy, the production and sale of articles which, it is assumed to be desirable the public should be able to get." (*Dr. Miles Medical Co.* v. *Park & Sons* (1911), 220 U. S. 373, dissenting opinion at p. 412). It is this philosophy that lies at the heart of state unfair sales laws and as was pointed out by the Supreme Court of Iowa in the case of *May's Drug Stores, Inc.* v. *State Tax Commission* (1951), 242 Iowa 319, 45 N. W. 2d 245:

> "The question of whether due process is satisfied in this police power measure is whether the means adopted—prohibition of all below cost sales—is reasonable. As previously stated, it is not rendered unreasonable because failing to limit the prohibition to below cost sales intended to injure. And we feel it is not rendered unreasonable by failing to limit the prohibition to sales that can be shown to have the effect or result of injuring free competition. The legislative findings of the evils attributable to below cost selling, the frequent connection between sales below cost and injuries to competitors in free competition, and the difficulty in proving that connection in each case, justifies the flat prohibitition without requiring a judicial finding that each particular below cost sale has the effect or result of injuring a competitor or destroying competition * * *.

"The fundamental policy of the legislation is that freedom of competition is desirable and whatever substantially lessens it or tends to create a monopoly is an evil. The legislature finds that, ordinarily, sales below cost injure competitors and destroy competition. That is sufficient justification for the prohibition of all such sales—at least in the absence of some showing that a substantial volume of sales below cost by dealers would not have such a result. *Booth* v. *Illinois* 184 U. S. 424. * * * If the ordinary and natural result of sales below cost is destructive of competition, then a regulation banning sales below cost is a reasonable regulation * * *"

The Supreme Court of the State of California in construing its unfair sales law as long ago as 1938, pointed out in the case of *Wholesale Tobacco Dealers Bureau* v. *National Candy & Tobacco Co.* (11 Cal. 2d 634, 82 P. 2d 3):

"It has now become firmly established that the police power of the state extends not only to the preservation of the public health, safety and morals, but also extends to the preservation and promotion of the public welfare. In recent years the state, in promoting and advancing the general welfare of its citizens, has frequently and properly used this power to promote the general prosperity of the state by the regulation of economic conditions. This apparent extension of the police power is in fact no extension at all. The police power has not expanded. Its proper exercise has always been and still is confined to regulation in the public welfare, and has always been and still is subject to the standard of reasonableness in its relation to that interest. However, changed social, political and economic conditions have enlarged the field of conduct in order that the general welfare may be adequately protected. The proper application of the power cannot be measured by past precedents—the test is, of course, present day conditions. These principles have frequently been enunciated by this court and by the Supreme Court of the United States * * *"

The unfair sales law of Oklahoma is reasonably related to the ends to be achieved in the elimination of cutthroat competition and the mitigation of disastrous price wars. It imposes no arbitrary deprivation of property nor does it unfairly discriminate against classes and categories. It merely requires a merchant who proposes to sell products to sell his merchandise at a price in excess of the cost of such commodities to him. A statutory presumption is created that a retail merchant's cost of doing business is 6% of the invoice or replacement cost of his merchandise. (*Oklahoma Unfair Sales Law, supra,* Sec. 598.2(a)). This presumption is rebuttable by proof of a lower cost of doing business. In the absence of such proof the presumption may validly stand as a most reasonable conjecture of the minimal figure for such costs.

The latest economic evidence indicates that the true costs of doing business by a retailer are grossly in excess of the modest figure established by the Oklahoma statute. A survey of operating expenses for twenty-two lines of retail trade shows that such operating expenses range from a minimum of 15.9% to a maximum of 50% of net sales in the respective industries (Brown & Davidson, *Retailing Principles and Practices* (Ronald Press, 1953), pages 644-645, table 27 "*Gross Margin, Operating Expense and Net Profit Ratio For Twenty-two Lines of Retail Trade*" citing Dunn & Bradstreet, Inc., "*Operating Ratios For Twenty-five Lines of Retail Trade*"). In appellant's own industry it is reliably stated that net expenses of doing business by a grocery chain constitute 17.6% of total sales (Englund, *Operating Results of Food Chains in 1957* (Harvard University, Graduate School of Business Administration, 1958) table 2 at p. 4, see also *id* at 3).

Given the problem to be remedied, the solution proposed by the State of Oklahoma in the form of an unfair sales

act is disclosed to be mild and uniform in its application. It strikes at only the most blatant and oppressive of fraudulent commercial conduct in the form of loss leader selling and permits substantial leeway for all proper forms of competitive conduct. Not only has the appellant failed to show that it has been injured by the operation of the law, it has failed to demonstrate any conceivable circumstances in which a merchant who does not sell below cost with the intent to injure competition would be adversely affected by that state's unfair sales act.

It is accordingly respectfully submitted that the Oklahoma Unfair Sales Law is a proper exercise of the police power of the state for the purposes of protecting the public welfare and does not constitute a deprivation of due process of law or a denial of its equal protections under the Fourteenth Amendment of the Constitution of the United States.

POINT II

The Oklahoma Unfair Sales Act is consistent with Federal trade regulatory legislation and does not conflict with the Federal supremacy clause in Article VI, Clause 2 of the Constitution of the United States.

Appellant's brief cites but one case where state regulation of commercial conduct was held to be in conflict with the provisions of the Federal Antitrust Law. That case (*Schwegmann Brothers* v. *Calvert Distillers Corp.* (1951), 341 U. S. 384) invalidated the operation of the "nonsigner" clause of a state fair trade law in interstate commerce as violative of the *per se* illegality of price fixing doctrine under the Sherman Antitrust Act (but *cf. Old*

Dearborn Distilling Co. v. *Seagram Distilling Corp.* (1936), 299 U. S. 183). What this Court found objectionable in the *Schwegmann* case was the fixing of uniform prices by private agreement binding upon all who dealt in the product. Unfair sales laws do not involve private agreements for uniform prices. They are the actions of a state designed to permit wide variation in price so long as the price is not set below the individual seller's cost in an attempt to deceive the public and injure competition.

Loss leader statutes are so radically different in philosophy from fair trade laws as to make widely inapposite any analogies drawn from the field of the latter to that of the former.

Unfair sales laws are intended to define a competitive tort—the pricing of merchandise below cost for the purpose of deceiving the consuming public. Fair trade laws are intended to protect the brand name and good will of a merchant's product. Unfair sales laws, unlike fair trade laws, do not permit a manufacturer of his own volition to create, by contract with wholesalers and retailers, rigid minimum resale prices for trade-marked products. They merely require an application of the old tort principle of *sic utere tuo ut alienum non laedas* to the field of buying and selling. Here there is no attempt to fix prices but merely an attempt to require that a merchant who sells a product below the total costs of his acquisition of such product justify such sale as having been made without malevolent intent.[4]

It cannot be too strongly emphasized that unfair sales laws do not attempt and are not intended to set or fix uniform prices. They do not guarantee any merchant a profit on his sales. The minimum statutory markup over

[4] For a more detailed analysis of the difference between fair trade laws and unfair sales acts, see *Zorn & Feldman op. cit.* at pages 317 to 326, inclusive.

the acquisition cost of the commodity has been demonstrated (page 25, *supra*) to be less than half of the minimum operating expense in any line of trade. Even so, a putative violator is permitted to show that his costs of doing business are less. *Commissioner* v. *Ryan* (Mass. Sup. J. Ct., 1948) 80 N. E. 2d 471. The law merely forbids him to sell at less than his cost since such practice has been found to be generally injurious to the economic welfare. As was stated by the Supreme Court of Louisiana in *Louisiana Wholesale Distributors Association* v. *Rosenzweig* (1948), 214 La. 1, 36 So. 2d 403 at 407 "Such acts have consistently been held not to be price fixing statutes. They merely fix the level below which producers and distributors may not sell without injury to a competitor and, ultimately, to the community. * * *" To the same effect see *Wholesale Tobacco Dealers Bureau* v. *National Candy & Tobacco Co.* (1938), 11 Cal. 2d 634, 82 P. 2d 3, 17; *Rust* v. *Griggs* (1938), 172 Tenn. 565, 113 S. W. 2d 733, 735; *Associated Merchants* v. *Ormesher* (1939), 107 Mont. 530, 86 P. 2d 1031, 1033 and *State* v. *Sears* (1940), 4 Wash. 2d 200, 103 P. 2d 337, 346. A comment in the University of Pennsylvania Law Review states: "* * * These statutes do not undertake to *fix* prices at what the legislature considers a desirable level. While all industries are subject to the statutory provisions, only those businesses will be affected which are engaged in uneconomic practices, i.e. those selling goods below cost * * *. There would seem to be little reason to conclude there is a vested right to engage in such socially destructive practices, * * *." (86 U. P. L. R. 780, 781)

But for the *Schwegmann* case, here demonstrated to be inapplicable,[5] the appellant cites no authority for the general proposition that state regulation of internal commercial conduct can conflict with federal antitrust laws. On

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[5] *See also Opinion Atty. Gen. Minn.* 5/25/51 quoted at 1951 CCH Trade Cases par. 62, 833.

the other hand, the appellee's brief at pages 39 and 40 clearly establishes the state's right to act in such circumstances.

Nor does the appellant cite authority for the specific proposition that sales below cost laws are in conflict with the federal antitrust laws. To the contrary, its argument is that because sales below cost have been condemned by both Congress (appellant's brief, p. 57) and the grocery industry (appellant's brief, p. 59), the several states may not take action to inhibit locally conduct which the federal government proscribes nationally. This curious contention, if upheld, would mean that any federal enactment in a field of concurrent jurisdiction would automatically invalidate all state legislation in that field.

The appellant is, however, quite correct in noting that the federal government has, during the past half century, become increasingly aware of the pernicious effect of sales below cost. As long ago as 1916 Congress prohibited sales below cost in foreign commerce (*Laws* of 1916, Chap. 463, Sec. 801, 39 *Stat.* 798, 15 U. S. C. Sec. 72). This law authorizes treble damage suits by parties injured by its violation and expressly reserves the state courts' jurisdiction where such conduct constitutes a violation of state law as well.

Section 3 of the Robinson-Patman Act (15 U. S. C. 13a) makes it unlawful for any person in the course of interstate commerce to sell goods at unreasonably low prices for the purpose of destroying competition or eliminating a competitor. It is by now well established that the phrase "unreasonably low prices" means a sale below cost (*Louisiana Farmers Protective Union* v. *Great Atlantic and Pacific Tea Co.* (CCA 8, 1942) 131 F. 2d 419; *Gordon, Wolff, Cowan Co. Inc.* v. *Independent Halvah & Candies, Inc.* (S. D. N. Y., 1949) 9 F. R. D. 700; *F & A Icecream* v. *Arden Farms* (S. D. Cal, 1951) 98 Fed. Supp. 180 at 189; *Moore* v. *Mead's Fine Bread Co.* (1954), 348 U. S. 115.

In addition to the grocery industry conference rules cited by the appellant at page 59 of its brief, trade practice conference rules promulgated by more than sixty industries have declared sales below cost to be an unfair method of competition.[6] These trade practice conference rules are promulgated by the Federal Trade Commission pursuant to authority granted by the Federal Trade Commission Act and are in the nature of advisory opinions for the guidance of businessmen (16 C. F. R. Ch. 1, Subch. A, Part 2, Subpart C, section 2.21). The rules are issued either as Group I or Group II rules. Group I rules are those which define practices considered by the Commission to be violative of laws administered by it (*id.* section 2.22). Invariably rules proscribing sales below cost fall into the Group I category.

This consistent federal policy against predatory pricing is interpreted by the appellant as a bar to supplementary state legislation not inconsistent with such federal policy.

Although the appellant insists that the Oklahoma statute is "in irreconcilable conflict" with federal regulation of sales below cost (appellant's brief, p. 58) this contention is supported by nothing more than the claims (1) that the Oklahoma definition of a sale below cost imposes stricter standards than those imposed by Section 3 of the Robinson-Patman Act and (2) the trade practice conference rules for the grocery industry already regulate sales below cost for this appellant.

In answer to the first branch of this argument, it has already been shown that the judicial construction of the Robinson-Patman Act phrase "unreasonably low prices" has defined it as synonymous with sale below cost (see

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[6] *See e.g.*, Rule 7 of the *Paper Bag Industry*, 16 C. F. R. 24, effective July 17, 1931 and Rule 3 of the *Gummed Paper & Sealing Tape Industry*, 16 C. F. R. 19, promulgated June 24, 1955, as representative of such rules.

cases cited *supra* at p. 29). It is quite obvious that compliance with the state standard would be acquiescence to not defiance of the federal standard. The federal law, having been drawn in broad general terms, obviously looks to the state for supplementation, especially in the field of private enforcement (*Nashville Milk Co.* v. *Carnation Co.* (1958) 355 N. S. 373).

In answer to the second branch of this argument it is only necessary to note that Rule 6 of the grocery industry trade practice rules, to which appellant professes to subscribe, follows the same statutory scheme as that found in the Oklahoma Act. It must also be noted that, as previously mentioned, these rules are advisory only and are enforceable by no sanctions. For that very reason it was necessary for the several states to enact legislation lending effective enforcement power to avowed federal policy.

Thus it is conclusively shown that for the last forty odd years the federal government has outlined a policy of distaste for sales below cost, leaving to the states the programatic implementation of such measures by local laws designed to fit most closely the immediate needs of its inhabitants. The federal government has created, in the field of loss leader sales, a lowest common denominator of business conduct, applicable everywhere, leaving to the judgment of the individual state jurisdictions what further measres should be taken in the interests of its citizens to implement and make meaningful the guidelines indicated by the expressed federal policy.

From the foregoing it must be concluded that the Oklahoma Unfair Sales Law is supplementary to and not in conflict with federal policy on the subject of loss leader legislation, applying that policy in areas beyond the reach of federal law. As such it does not interfere with the operation of federal antitrust law and does not violate the preemption sections of Article VI of the Constitution of the United States.

CONCLUSION

It is respectfully submitted that this Court should dismiss the appeal and affirm the judgment of the court below.

Respectfully submitted,

CHESTER INWALD
Counsel of Record

CHESTER INWALD
Attorney for Amicus Curiae,
National Association of Tobacco
Distributors, Inc.

Of Counsel:
HARTMAN & CRAVEN
39 Broadway
New York 6, N. Y.

Counsel of Record:
CHESTER INWALD
39 Broadway
New York 6, N. Y.

CERTIFICATE OF SERVICE

I, CHESTER INWALD, attorney for The National Association of Tobacco Distributors, Inc., *amicus curiae* herein and a member of the Bar of the Supreme Court of the United States, hereby certify that on the 6th day of May, 1959, I served copies of the foregoing motion for leave to file a brief as *amicus curiae* and brief of *amicus curiae* on the merits on the several parties to the within appeal as follows:

On Oklahoma Retail Grocers Association, Inc., a corporation, and Louie J. Speed, Inc., a corporation, by mailing copies in duly addressed envelopes with air-mail postage prepaid to their respective attorneys of record as follows:

Miskovsky & Miskovsky
Hightower Building
Oklahoma City, Oklahoma

William J. Holloway, Sr.
First National Building
Oklahoma City, Oklahoma

Looney, Watts, Looney & Nichols
First National Building
Oklahoma City, Oklahoma

Samuel M. Lane
26 Broadway
New York, New York

On Safeway Stores, Inc., a corporation, by mailing copies in duly addressed envelopes with air-mail postage prepaid to its attorneys of record as follows:

Embry, Crowe, Tolbert, Boxley & Johnson
570 First National Building
Oklahoma City, Oklahoma

Clark, Reed & Clark
1900 Adolphus Tower
Dallas 2, Texas

Robert L. Clark
1900 Adolphus Tower
Dallas 2, Texas

CHESTER INWALD
39 Broadway
New York 6, N. Y.
Attorney for National Association of Tobacco Distributors, Inc.